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No. 91-42

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

THERESE A. BURKE, ET AL.,
Respondents.

On Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether payments received in settlement of claims under Title VII of the Civil Rights Act of 1964 are excluded from the claimant's gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness." (26 U.S.C. 104(a)(2)).

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IN THE SUPREME COURT OF THE UNITED STATES

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**BRIEF OF
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
AS AMICUS CURIAE**

The National Employment Lawyers Association, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the

Respondents. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus urges the Court to follow the well established nature of the claim test in interpreting section 104(a)(2) of the Internal Revenue Code, and to thus affirm the holding of the Sixth Circuit that awards and settlements in statutory employment discrimination cases are excludable from gross income as damages received on account of personal injuries.

The National Employment Lawyers Association ("NELA"), formerly the Plaintiff Employment Lawyers Association, is a voluntary organization of over 1,200 attorneys who specialize in the representation of the individual

in controversies arising out of the workplace. NELA has devoted itself to supporting remedial civil rights legislation in Congress, and in the state and federal courts. NELA's membership and its governing body is composed of experts in state and federal equal employment opportunity statutes as well as wrongful discharge law. NELA has a direct interest in the law governing the construction and application of the civil rights statutes as NELA members' clients litigate under these statutes regularly. NELA is well-qualified to brief the Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving the employment discrimination laws. See, e.g., Caterpillar, Inc. v.

Williams, No. 86-526 (Oct. 1986 Term); Harbison -Walker Refractories Inc. v. Brieck, No. 87-271 (Oct. 1987 Term); English v. General Electric Co., No. 89-152 (Oct. 1989 Term); Cooter & Gell v. Hartmarx Corp., No. 89-275 (Oct. 1989 Term).

ARGUMENT

AN AWARD OR SETTLEMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT CONSTITUTES DAMAGES RECEIVED "ON ACCOUNT OF PERSONAL INJURIES" WITHIN THE MEANING OF SECTION 104(a)(2) OF THE INTERNAL REVENUE CODE

Introduction

This Court's focus should be on the nature of the claim for which compensation is being received by the taxpayer, not the harm or consequences of the alleged wrongdoing. Adhering to this proper focus, the Court must determine whether a statutory employment

discrimination claim seeks redress for personal injuries or otherwise. In Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), the Court held that a claim for employment discrimination under 42 U.S.C. Sec. 1981 "is a fundamental injury to the individual rights of a person." 482 U.S. at 661. Claims for employment discrimination pursued under Title VII of the Civil Rights Act of 1964, like those before the Court in the case sub judice, should be treated no differently. Such claims arise under a law whose purpose "is to promote . . . a deeper respect for human dignity."[1]

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[1] Remarks of President Lyndon B. Johnson on July 2, 1964 upon the signing of the Civil Rights Act of 1964, reprinted in Charles and Barbara Whalen, "The Longest Debate: A Legislative History of the 1964 Civil Rights Act" 232 (1985).

Thus, awards and settlements in statutory employment discrimination cases should be excluded from gross income as damages received on account of personal injuries. Any other result would increase transactional costs and diminish the prospects of settlement -- a result that would be inconsistent with the strong legislative directive that efforts be made to conciliate such disputes.

A. Application of Section 104(a)(2) requires the Court to focus on the nature of the Respondents' claim

Section 61(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that, except as otherwise provided in the Code, gross income means "all income from whatever source derived." Accordingly, any funds or other accessions to wealth received by a

taxpayer are presumed to be gross income, unless the taxpayer can demonstrate that the accession fits into one of the specific exclusions created by other sections of the Code. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430-431 (1955).

The exclusion at issue here is found in Section 104(a)(2) of the Code, which provides that gross income does not include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This exclusion remains substantially the same as its original predecessor which was enacted as part of the Revenue Act of 1918, Pub. L. 65-254, Ch. 18, section 213(b)(6), 40 Stat. 1057, 1065-66. While Congress has failed to ever precisely define the

phrase "personal injuries or sickness,"[2] it has chosen to retain the exclusion through its numerous overhauls and reforms of the Internal Revenue Code.[3]

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[2] Neither the legislative history of the Revenue Act of 1918, H. Rep. No. 767, 65th Cong., 2d Sess. (1918) 1939-1 C.B. (Part 2) 86, 92, nor that of the Internal Revenue Code of 1954, H. Rep. No. 1337, 83d Cong., 2d Sess. 15 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 15-16 (1954) contains any such definition.

[3] In 1989, the Treasury Department proposed that IRC § 104(a)(2) be amended to permit only damages for physical injury to be excluded from income. Under the Department's proposed amendment, damages for nonphysical torts would have been no longer excluded from income taxation. The Department's proposal was rejected. The Conference Report stated as follows:

> Under present law, damages recovered on account of personal injury are excluded
>
> (continued...)

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[3](...continued)

> from gross income. In some cases, courts have held that this exclusion is available even though there is no physical injury, for example, in cases involving employment discrimination.
>
> Conference Report to accompany H.R. 3299, Omnibus Budget Reconciliation Act of 1989, H.R. Report No. 101-386, 101st Cong., 1st Sess. 622 (November 21, 1989). See also Report of the Committee on the Budget of House of Representatives to accompany H.R. 3299, Omnibus Budget Reconciliation Act of 1989, H.R. Report No. 101-247 101st Cong., 1st Sess. 1354-55 (Sept. 20, 1989):
>
> > "Under present law, gross income does not include any damages received . . . on account of personal injuries or sickness." (Sec. 104)). Courts have interpreted this exclusion broadly in some cases to cover awards for personal injury that do not relate to a physical
> >
> > (continued...)

The Treasury Regulations amplify the section 104(a)(2) exclusion by defining "damages received on account of personal injuries" to mean "an amount received . . . . through prosecution of a legal suit or action based upon tort or tort-types rights, or through a settlement entered into in lieu of such prosecution." Treas. Reg. section 1.104-1(c). This Regulation indicates that the excludability of damages depends

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[3](...continued)
injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving employment discrimination ...".

Cf. Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.")

upon the nature and origin of the underlying claim. The Tax Court has historically stated that the correct test in determining whether damages fall within the section 104(a)(2) exclusion is tc look to the origin of the claim. See, e.g., Glynn v. Commissioner, 76 T.C. 116, 119 (1981), aff'd, 676 F.2d 682 (1st Cir. 1982); Seay v. Commissioner, 58 T.C. 32 (1972); McDonald v. Commissioner, 9 B.T.A. 1340 (1928). In application, however, the Tax Court has frequently deviated from its own test and has looked to the consequences of a tort or tort-type claim rather than the origin of the claim.

While the Tax Court has interpreted the exclusion to cover compensatory damages for both physical and

nonphysical injury to the person, Church v. Commissioner, 80 T.C. 1104, 1106 (1983), in cases involving nonphysical injury the Tax Court, until recently, has held that only those damages which actually reimburse for such nonphysical personal injury, as opposed to damages paid for earnings lost because of such injury, are excludable under section 104(a)(2) of the Code. See, e.g., Roemer v. Commissioner, 79 T.C. 398 (1982), rev'd, 716 F.2d 693 (9th Cir. 1983) (holding that compensatory damages received in libel suit for injury to professional reputation were includable in gross income); compare Church v. Commissioner, 80 T.C. 1104 (1983) (damages received by Arizona attorney general in defamation suit were for injuries to his personal reputation and

therefore excludable under section 104(a)(2)).

The validity of the Tax Court's approach in examining the consequences stemming from a tortious action, instead of focusing on the origin of the claim, in the case of a nonphysical injury was first questioned by the Second Circuit in its review of Agar v. Commissioner, 290 F.2d 283, 284 (1961), aff'g, 19 T.C.M. (CCH) 116 (1960). Thereafter, the Court of Appeals for the Ninth Circuit reversed the Tax Court's position in Roemer, pointing out that when an individual recovers a lump-sum award for a physical personal injury the entire award is properly excluded under section 104(a)(2) even when the predominant result of the injury is loss of income, and concluded that any

different approach for a nonphysical injury -- such as defamation -- would be illogical. Roemer, 716 F.2d at 697. The Roemer court held that all compensatory damages, however computed, in a claim alleging a personal tort were excludable under section 104(a)(2) of

the Code.[4] The Roemer court stated the

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[4] In response to the Ninth Circuit's opinion in Roemer, the Internal Revenue Service issued Rev. Rul. 85-143, 185-2 CB 55, stating that it would continue to follow the rationale of the Tax Court's Roemer opinion, distinguishing between injury to personal reputation and business reputation.

The Tax Court in Roemer also held that the entirety of the punitive damage award was taxable. The Ninth Circuit overturned this holding, stating that when Congress enacted section 104(a)(2) to make tax-free "any damages" arising from personal injury, this meant all damages, including punitive damages. Several years later, the Tax Court, sitting en banc, ruled in a 14-2 decision that punitive damages under section 104(a)(2) are excludable. Miller v. Commissioner, 93 TC 330 (1989). Thereafter, the Fourth Circuit reversed the Tax Court's holding. Commissioner v. Miller, 914 F.2d 586 (1990). The rationale of the Fourth Circuit was that punitive damages serve no compensatory function. This rationale is squarely contrary to the Ninth

(continued...)

rule thusly:

> The nonpersonal consequences of a personal injury, such as a loss of future income, are often the most persuasive means of proving the extent of the injury that was suffered. The personal nature of an injury should not be defined by its effect.

716 F.2d at 699.

In Bent v. Commissioner, 87 T.C. 236 (1986), aff'd, 835 F.2d 67 (3d Cir. 1987), Judge Chabot of the Tax Court, without discussing Roemer, reached a result identical to that reached by the Ninth Circuit. The decision held that damages, measured primarily by lost wages, paid to a professor in settlement of a claim brought under 42 U.S.C. section 1983 for violation by a local

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[4](...continued)
Circuit's in Roemer. See also Keller v. Commissioner, 62 T.C.M. (CCH) 401 (1991).

school district of the petitioner's First Amendment right to freedom of speech, were excludable under section 104(a)(2) of the Code. This result was reached after a review of various Supreme Court decisions discussed therein which held that section 1983 creates a species of tort liability for personal injury. In affirming the Tax Court, the court of appeals rejected the Commissioner's argument that because the settlement received by Bent contained an amount based upon his lost wages, that sum was compensation not excludable under section 104(a)(2), stating "an award of damages for the violation of a constitutional right may be measured in whole or in part by the amount of lost wages." Bent, 835 F.2d at 70.

Finally, in Threlkeld v. Commissioner, 87 T.C. 1294 (1986), aff'd, 848 F.2d 81 (6th Cir. 1988), a decision reviewed by the full Tax Court, that Court announced by a vote of 15 to 1 that it was abandoning the position it had taken in Roemer and other cases, i.e., that the consequences of a nonphysical personal injury (such as damage to personal reputation as opposed to professional reputation) determine excludability under section 104(a)(2). Rather, the Tax Court held that the sole basis for excludability will be whether the claim for which the damages are paid, however, such damages are computed, is one for personal injury.[5]

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[5] This test for excludability under section 104(a)(2) which is adopted in the Regulations is consistent with the "origin of the claim" inquiry (continued...)

In Threlkeld, the Tax Court held that damages awarded in a claim for malicious prosecution under state law were excludable under section 104(a)(2) even though they were paid for damage to professional reputation because malicious prosecution is a tort claim for personal injury under state law.

The Tax Court specifically discussed the inappropriateness of distinguishing between personal and professional damages in personal injury cases involving nonphysical injury whereas it had never made such a

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[5](...continued) developed by the Supreme Court for determining the tax treatment of certain items; see e.g., Arrowsmith v. Commissioner, 344 U.S. 6 (1952); Woodward v. Commissioner, 397 U.S. 572 (1970); United States v. Hilton Hotels Corp., 397 U.S. 580 (1970).

distinction in cases involving physical injury. Threlkeld, 87 T.C. at 1300-1301. And, after noting that the beginning and the end of the inquiry should be whether damages received are paid on account of "personal injuries", 87 T.C. at 1299, the court stated

> In conclusion, we emphasize that the question of interpretation presented by the language of section 104(a)(2) presents conceptual challenges. We also recognize that focusing upon the nature of the taxpayer's injury instead of the nature of the consequences flowing from that injury will often be difficult. However, this is no more difficult in most cases than the type of inquiry previously required by the line of cases, culminating in Roemer, which distinguished the nature of the consequences resulting from a claim. Furthermore, the approach that we will now apply in all cases, whether the injury claimed is personal, more accurately reflects the inquiry required by the plain meaning of the statute. Exclusion under section 104

> will be appropriate if compensatory damages are received on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law.

The fact that the recovery in a tort-type case is, in whole or in part, of monies that should have been paid for work actually performed is not a reasoned basis for treating the recovery as taxable. Once again, such an analysis focuses on the nature of the recovery and not the nature of the wrong being redressed which is the proper focus. Thus, the Court should reject cases like Bowman v. United States, 824 F.2d 528 (6th Cir. 1987) and Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989), which focus on the fact that the recovery was for work actually performed. Rather, it is the Third

Circuit that had it right in Byrne v. Commissioner, 883 F.2d 211, 214 (1989), when it stated:

> The relevant inquiry ... is whether the settlement was received on account of personal or non-personal injuries, not whether the damages compensate the taxpayer for economic losses.[6]

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[6] In Byrne, the Third Circuit held that all of the damages arising from settling claims for breach of the federal Fair Labor Standards Act and for wrongful discharge under New Jersey law - not just part of them - were tax-free personal injury damages. In her complaint to the Equal Employment Opportunity Commission, Ms. Byrne alleged that she had been fired for reporting discriminatory compensation practices. She recovered a $20,000 settlement, of which the Tax Court allocated half to taxable lost wages resulting from the firing. On appeal, the Third Circuit upheld Ms. Byrne's argument that, although her damages were a fraction of lost income, they should be excluded under section 104(a)(2).

B. The violation of one's statutory right to be free of invidious employment discrimination gave rise to a claim for personal injury

The Government argues that the respondents' claim is merely a claim that their economic interests have been injured. Its argument ignores the realities of discrimination that are well known to this Court. Discrimination -- to be treated differently because of one's gender or one's race -- is an affront to human dignity. Here, the Court is confronted with a classic case of biased stereotypical thinking -- male employees are worth more than female employees. Such prejudice not only deprives female employees of their true worth in terms

of salary, it also is an insult to them as individuals.[7]

The Supreme Court has consistently held that the constitutional right to be free of sex discrimination is a personal right. Cannon v. University of Chicago, 441 U.S. 677, 691 n. 13 (1979). Gender discrimination, which both the Equal Pay Act and Title VII were enacted to redress, was analyzed in detail by the Court in Davis v. Passman, 442 U.S. 228 (1979). In Davis, the Court held that the equal protection component of the Due Process Clause of the Fifth

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[7] This Court has emphasized that "[t]he principal focus of the statute is the protection of the individual employee ..." Connecticut v. Teal, 457 U.S. 440, 455 (1982). See also Furnco Construction Co. v. Waters, 438 U.S. 567, 579 (1978); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

Amendment to the Constitution provides federal congressional employees a federal constitutional right to be free of gender discrimination in employment. The Court described the right as personal, stating "it is petitioner, after all, who must suffer the effects of such discrimination." 442 U.S. at 235 n. 10 (citations omitted). And, as the Tax Court reasoned in its decision in Thompson v. Commissioner, "[s]ince the right to be free from gender or sex discrimination is a personal right as the Supreme Court has held, it follows that payments of damages made for violation of that right are damages for personal injuries." 89 T.C. at 649. See also Bivens v. Six Unknown Narcotics Agents, 403 U.S. 399 (1971) (violation of the Fourth Amendment right to be free

of unreasonable search and seizure compared to the common law tort of trespass and held to be actionable in damages); Wulf v. City of Wichita, 883 F.2d 842, 872-73 (10th Cir. 1989) (court, focusing on the nature of the claim, held that a settlement award in a civil rights action for wrongful discharge in violation of the First Amendment was nontaxable).

The injuries suffered by respondents are similar to those incurred by the petitioner in Metzger v. Commissioner, 88 T.C. 834 (1987), aff'd mem., 845 F.2d 1013 (3d Cir. 1988). Metzger, an associate professor of Spanish, had been denied tenure and had her teaching contract terminated. She filed various state and federal claims in various fora, including a Title VII

claim, alleging breach of contract and violation of her constitutional and statutory rights to be free from discrimination based on her gender and national origin. Metzger settled her claims for $75,000, half of which was designated in the settlement agreement as wages for federal income tax withholding purposes only. Metzger excluded the balance from her income under section 104(a)(2) as damages for personal injuries.

The Tax Court upheld this exclusion, stating that the majority of the settled claims (i.e., her discrimination claims) were tort or tort-type claims and that at least the amount excluded by Metzger constituted damages on account of personal injuries. 88 T.C. at 858. See also, Melani v. New

York City Board of Education, 652 F.Supp. 43 (S.D.N.Y. 1986) (those portions of amounts paid in settlement of a class action sex discrimination suit which are allocable to 42 U.S.C. section 1983 claims are excludable under section 104(a)(2)); Bent, 835 F.2d 67 (damage award for the violation of the right to freedom of speech -- a constitutional right -- constitutes damages for personal injury).

The right to be free from gender discrimination is a personal statutory right. Thus, just as violation of First Amendment rights causes personal injury, Bent, 835 F.2d 67, so must violation of this right to live and work without being disadvantaged solely by reason of gender. The injury suffered by respondents as victims of sex

discrimination is personal; its character does not vary according to the statutory schemes available to them for the injury's redress. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-61 (1975), the Court, in comparing 42 U.S.C. § 1981 to Title VII, concluded that the nature of the injuries suffered under both statutes are essentially the same. See Metzger, 88 T.C. at 856 (discussing Johnson).

Absent proof of sex discrimination, respondents would not have received the wage differential award. For this reason, this case is distinguishable from the express or implied contract cases in which a factual determination was made that an amount was intended to settle a contract claim rather than a tort or tort-type claim. See, e.g.,

Agar, 290 F.2d 283 (2nd Cir. 1961) (claim for additional compensation for years of service); Glynn, 76 T.C. 116 (payment for accrued sick leave); Knuckles v. Commissioner, 23 T.C.M. (CCH) 182 (1964), aff'd, 349 F.2d 610 (10th Cir. 1965) (payment in settlement of employment contract claim). Employment discrimination claims are tort-type claims; whereas, common law claims for breach of employment contract, written or implied, are not. Awards and settlements under the former are non-taxable; whereas those for breach of an employment contract are taxable. Thus, one who pursues a claim for breach of implied contract based on an employer's employee manual and receives monies in a judgment or

settlement thereof must include that amount in gross income.

In addition, the position that claims of discrimination under Title VII are tort-type claims is reinforced by the decision of the Third Circuit Court of Appeals in Byrne v. Commissioner, 883 F.2d 211 (3d Cir. 1989). In Byrne, one of the claims raised was that the plaintiff's employer violated the retaliation provision (section 215(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3)) by allegedly discharging her because she cooperated in an EEOC investigation of alleged Equal Pay Act (EPA), 29 U.S.C. § 206(b), violations. Under section 216(b) of the FLSA, 29 U.S.C. § 216(b), the remedies for violating section 215(a)(3) are very similar to the remedies available under

Title VII ("employment, reinstatement, promotion and the payment of wages lost and an additional equal amount as liquidated"). The Third Circuit Court of Appeals held that an action for damages under section 216(b):

> is a claim asserting the violation of personal injury tort or tort-type right, rather than for an economic right arising out of contract. We reach this conclusion because a suit alleges the violation of a duty owed the plaintiff by the defendant employer which arises by operation of the Act. This duty is independent of any duty an employer might owe his employee pursuant to an express or implied employment contract; it arises by operation of law. Thus, the statutory claim seeks to remedy a statutory violation that the law has defined as wrongful. See Black's Law Dictionary 1660 (rev. 4th ed. 1968) ("Tort" defined as a "wrong independent of contract" and "a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the

> parties."). It is more tort-like than contract-like, and we therefore hold that the settlement of a claim than an employer has violated section 215(a)(3) of the Fair Labor Standards Act is the settlement of a personal injury claim, as that term is used in section 104(a)(2), and that the proceeds of the settlement are excludable from federal income tax.

Byrne, 883 F.2d at 215

While the holding in Byrne is limited to claims under section 216(b) of the FLSA, the proposition that the injury arises out of a legal duty owed to the employee by the employer which is independent of any contract or agreement between the parties, is equally applicable to claims under the various civil rights acts, including Title VII.

Replete throughout the Congress' consideration of the legislative proposal that culminated in its historic

passage of the Civil Rights Act of 1964 were references to "the injustices and humiliations of racial and other discrimination.[8]

That a Title VII employment discrimination cases involves an affront to human dignity and is thus in the nature of a "dignitary tort"[9] was eloquently stated by Judge Gewin of the Fifth Circuit in one of the first reported Title VII appellate decisions:

> In conclusion, it may be observed that on the surface the present case concerns only the meaning of certain statutory provisions. But

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8 H.R. Report No. 914, Report of House Judiciary Committee accompany H.R. 7152, 88th Cong., 1st Sess. (Nov. 20, 1963) reprinted in Legislative History of Titles VII and XI of Civil Rights Act of 1964 at p. 2018 published by Equal Employment Opportunity Commission.

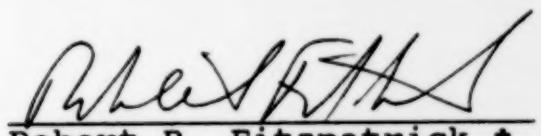
9 Cu is v. Loether, 415 U.S. 18., 195-96 n. 10 (1974).

> beneath the legal facade a faint hope is discernible rising like a distant star over a swamp of uncertainty and perhaps of despair. Those who love their work may sometimes forget that a successful human community requires the performance of may vapid and colorless tasks. Even the most tedious physical labor is endurable and in a sense enjoyable, however, when the laborer knows that his work will be appreciated and his progress rewarded. 'Work without hope,' said Coleridge, 'draws nectar in a sieve, And hope without an object cannot live.' The ethic which permeates the American dream is that a person may advance as far as his talents and his merit will carry him. And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all."

Miller v. International Paper Co., 408 F.2d 283, 294 (5th Cir. 1968) (footnote omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the holding below.

By: 

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CERTIFICATE OF SERVICE

I, Robert B. Fitzpatrick, Esq., hereby certify that on this 26th day of December, 1991, caused to be mailed first class, postage prepaid, two copies of the Amicus Curiae Brief of National Employment Lawyers Association in Support of Respondents and on December 31, 1991 two copies of the corrected Amicus Curiae Brief to the following:

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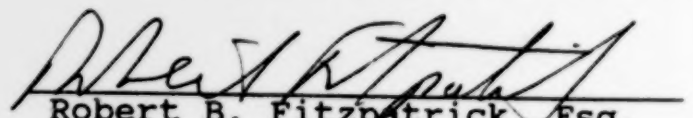

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